LE COPY

72-165

Supreme Court, U. S.
FILED
JUL 31 1972
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. _____

PAUL E. ENYART, Bankrupt
PAUL E. ENYART - - - - - Petitioner

versus

ASHLAND DISCOUNT COMPANY
JOHN SIMPSON, Trustee - - - Respondents

PETITION FOR WRIT OF CERTIORARI

JOHN T. DIEDERICH
MICHAEL R. DOWLING
DIEDERICH, CLINE & WILHOIT,
500 Price Building
Ashland, Kentucky 41101
Counsel for Petitioner

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

TABLE OF CONTENTS

	PAGE
I. Opinions Below	1
II. Jurisdiction	1
III. The Questions Presented	2– 3
IV. Statutes Involved	3– 4
V. The Material Facts Constituting the Case	4– 6
VI. Argument	6–10
VII. Conclusion	10–11
Proof of Service	12
Appendix	13–38
Findings of Fact and Conclusions of Law	13–33
Memorandum Opinion	34–38

TABLE OF AUTHORITIES

Table of Cases

	PAGE
Burchett v. Meyers, C.A. Nev. 1953, 202 Fed. 920....	9
Hedges v. Bushnell, C.C.A.N.M. 1939, 106 F. 2d 979..	6, 8
In re Bellis, D.C. N.Y. 1870, Fed. Cas. No. 1,275.....	9
In re Marx, C.C.A. 1942, 125 F. 2d 335.....	8
In re Underhill, C.C.A. N.Y. 1936, 82 F. 2d 258.....	9
Noroian v. Hern, C.A. Cal. 1970, 422 F. 2d 1092.....	9
Royal Indemnity Co. v. Cooper, C.C.A. 1928, 26 F. 2d 585. . .	9

Statutes

Title 28 U.S.C. 1254(1). . .	1
Title U.S.C. 45(c). . .	1
11 USC 32(b). . .	3, 7, 8, 10
11 USC 32(c)(2). . .	3- 4
11 USC 32(c)(7). . .	4
11 USC 32(c). . .	8, 9, 10

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. _____

PAUL E. ENYART, Bankrupt
PAUL E. ENYART - - - - - *Petitioner*

v.

ASHLAND DISCOUNT COMPANY
JOHN SIMPSON, Trustee - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

I. OPINIONS BELOW

This is a Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, judgment made and entered May 1, 1972. Copies of the Referee in Bankruptcy's Order, the memorandum opinion of the District Court, and the opinion of the United States District Court of Appeals for the Sixth Circuit are appended hereto.

II. JURISDICTION

The jurisdiction of the Court is based upon Title 28 U.S.C. 1254(1) and Title U.S.C. 45(c).

III. THE QUESTIONS PRESENTED

Does the statutory requirement that the bankrupt maintain books or records from which his financial affairs might be ascertained require the availability of records in accordance with good bookkeeping practice on the filing date of the Bankruptcy Petition?

Wherein the bankrupt's records were not compilated for four (4) years prior to filing the Bankruptcy Petition, did the procedure for adjudiciating the issue raised on Objections to Discharge provide the bankrupt a reasonable opportunity to be fully heard, where there was no request by the Referee, the Trustee or the Objecting Creditor for the production or inspection of records or any demand made for compilation of the same until after the first hearing on the Objections to Discharge excepting the Order directing the production of records for six (6) months immediately preceding the filing of the Bankruptcy Petition.

Was the procedure for adjudicating the issue raised on Objections to Discharge consistent with the bankrupt's right to be fully heard on the issue wherein after the initial hearing on the objections the bankrupt immediately engaged a CPA to compile his records into books of account in accordance with the Referee's requirement, but the CPA needed an additional forty-five (45) days to complete the compilation, which the Referee denied?

Was the procedure for adjudicating the issue raised on Objections to Discharge fair and orderly and in compliance with General Orders in Bankruptcy, Order 32, where the Trustee, who did not object to the suf-

ficiency of the bankrupt's records, and who did not file Objection to Discharge was allowed to challenge the sufficiency of the records in a brief to the Referee and to the Court of Appeals.

IV. STATUTES INVOLVED

11 USC 32(b):

> After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose, concerning his acts, conduct, and property, the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in section 94 of this title. Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard.

11 USC 32(c)(2):

> The court shall grant the discharge unless satisfied that the bankrupt has destroyed, mutilated falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts

or failure to have been justified under all the circumstances of the case.

11 USC 32(c)(7):

The court shall grant the discharge unless satisfied that the bankrupt has filed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: *Provided,* That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt.

Order 32. General Orders in Bankruptcy:

Any person opposing a discharge shall, on or before the time fixed for the filing of objections to the discharge, file a specification in writing of the grounds of his opposition.

V. THE MATERIAL FACTS CONSTITUTING THE CASE

The Bankrupt filed a voluntary petition in Bankruptcy in the United States District Court for the Eastern District of Kentucky on December 2, 1968.

The Bankrupt was insolvent, bankrupt and excessively indebted to the Objecting Creditor in 1964 due to gross mismanagement by his partner.

The Bankrupt after 1964 failed to maintain adequate compilations of his records, to the extent of

failure to file income tax returns for 1964-1968.

The Bankrupt was directed to produce at the first meeting of creditors records for six (6) months immediately preceding filing of the petition in bankruptcy.

There were four (4) hearings, including the First Meeting of Creditors prior to the filing of Objections to Discharge by the finance company.

At the four (4) hearings the bankrupt was not asked to produce any record for inspection nor ordered to produce compilated records. The Referee, the Trustee and the Creditor knew the bankrupt had failed to file income tax returns, and no complaints or demands were made concerning the same.

After filing of the Objections by the finance company there was still no request or demands made of the bankrupt in regards to his records.

At the initial hearing on the Objections to Discharge the Referee required the bankrupt to compile his records. To this end a Certified Public Accountant was engaged and testified at the next scheduled hearing that the bankrupt's records were logically arranged, and that the basic records necessary to complete the bookkeeping process had been preserved.

The bankrupt was financially distraught. His records were complicated and extensive. One request was made in regards to his records; namely, the Order accompanying the Notice of the First Meeting of Creditors. The Certified Public Accountant needed forty-five (45) additional days to prepare the compilation required by the Referee after the first hearing on the Objections to Discharge.

The Referee denied the request for a continuance, made prior to the next scheduled hearing on the Objections to Discharge.

The four (4) hearings prior to the October hearing on the Specification's of Objections to Discharge were not related to the adequacy of bankrupt's records.

VI. ARGUMENT

The record keeping requirement of the Bankruptcy Act was designed to enable a creditor to learn and discover the financial affairs of the bankrupt. Hedges v. Bushnell, C.C.A.N.M. 1939, 106 F. 2d 979.

The significancy of this case is that it focuses critically on a fallacy worthy of rejection, namely, the record keeping requirement was not intended to require bookkeeping for bookkeeping's sake but to enable creditors to know the business transactions of the bankrupt.

The Creditor and Trustee in this case never demanded production or inspection of any record nor a compilation of his records to investigate the affairs of the bankrupt.

In the state court, the Objecting Creditors filed a foreclosure proceeding which initiated the bankruptcy petition, and in the state court proceedings, the bankrupt counterclaimed against the Objecting Creditor for misrepresentation and over-reaching.

The bankrupt was financially distraught. His records were complicated and extensive. He had been engaged primarily in the used car business. There were numerous and extensive transactions. Without

any specific demand as to what records and what time periods the Objections Creditor was interested, the bankrupt was placed in an impossible position to respond to the general charge that he failed to maintain books or records from which his financial transactions might be ascertained.

Was it reasonable to expect the bankrupt to employ a CPA to organize his records for the previous four (4) years into books of account in the absence of any requests or inquiries along these lines?

The bankrupt explained to the Referee that he did not know what records the Objecting Creditor wanted. The Referee responded that the bankrupt should have known what good bookkeeping practices were.

The Objecting Creditor questioned that bankrupt at the first hearing on Objection to elicit information requiring books of account covering the years 1965-1968.

The CPA at the next hearing testified that the bankrupt had the basic supporting records necessary to complete the bookkeeping process.

The Objecting Creditor substantially completely financed the bankrupt's used car business, made regularly scheduled inventory checks, and was otherwise thoroughly familiar with the financial transactions of the bankrupt.

The procedure countenanced by the Court below was inconsistent with the right of the bankrupt to be fully heard on the issue. 11 U.S.C. 32(b).

The procedure countenanced by the Court below infringed Order 32, General Orders in Bankruptcy, substantially prejudicial to the bankrupt's right to a fair hearing.

The Referee required the availability of records in accordance with good bookkeeping practice.

The District Court in his opinion took note of the CPA's testimony that it would probably be possible to make a reconstruction of the bankrupt's affairs if the objecting Creditor's records were made available to the bankrupt.

The Court of Appeals in its opinion approved records if a competent accountant could reconstruct the records without expending unlimited amounts of time and money.

There are numerous decisions in the Circuit Courts of Appeals involving the interpretation of 11 U.S.C. 32(c). The question arises frequently and poses much difficulty.

Counsel for the bankrupt has been unable to find where this Court has decided a case involving the interpretation of 11 U.S.C. 32(c), General Order 32 and procedures relating thereto implementing 11 U.S.C. 32(b).

The tests vary from case to case.

> Records should show losses and gains and present a satisfactory explanation of receipts and disbursements.
>
> In re Marx, C.C.A. 1942, 125 F. 2d 335.

> It is enough if the records sufficiently identify the bankrupt's business transactions to permit intelligent inquiry respecting same.
>
> Hedges v. Bushnell, C.C.A. N.M. 1939, 106 F. 2d 979.

If a competent accountant can, from an examination of the books produced and in the possession of the trustee, determine the true financial condition of the debtor, they are sufficient to justify granting him a discharge.

In re Bellis, D.C. N.Y. 1870, Fed. Cas. No. 1,275.

Where the bankrupt is involved in many transactions of an extensive character, a substantially accurate and complete record of his affairs is essential to his discharge.

In re Underhill, C.C.A. N.Y. 1936, 82 F. 2d 258.

Records or books are sufficient so long as it is possible to ascertain bankrupt's financial condition and business transactions.

Burchett v. Meyers, C.A. Nev. 1953, 202 Fed. 920.

Records are inadequate if a competent accountant would be unable to determine the bankrupt's financial condition from his books and records.

Noroian v. Hern, C.A. Cal. 1970, 422 F. 2d 1092.

The language of 11 U.S.C. 32(c)—"to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained"—should be interpreted according to its plain meaning.

The statute clearly requires granting the discharge if on even balance it is possible that the records are adequate. The Bankruptcy Act is remedial legislation and should be liberally construed in favor of the bankrupt. Royal Indemnity Co. v. Cooper, C.C.A. 1928, 26 F. 2d 585.

The Referee in the instant case viewed the statute as requiring the availability of adequate records as of the date of filing the bankruptcy petition.

The District Court noted that the testimony of the CPA indicated that it was probably possible to reconstruct the financial affiars of the bankrupt, but nonetheless affirmed the Referee's order.

The Court of Appeals affirmed the order denying discharge stating that there was some limit of time and money beyond which a bankrupt cannot be extended the privilege of reconstructing his records to prove he maintained the same as required by 11 U.S.C. 32(c).

These views are not uniform, and are closely interlocked with the questioned propriety of the procedure which deprived the bankrupt of his right to be fully heard on the adequacy of the records to reflect his financial affairs 11 U.S.C. 32(b).

The bankrupt is entitled to know which parties are objecting to his discharge. The Trustee did not file a Specification of Objections to Discharge, General Order 32, and was not entitled to brief the Referee and the Court of Appeals on the issues raised in the Objecting Creditor's specifications.

VII. CONCLUSION

In conclusion, it is respectfully submitted that the bankrupt was not afforded a reasonable opportunity to be fully heard on the issue relating to the adequacy of his records and further that the Referee in Bankruptcy, the District Court, and the Court of Appeals' interpretation of 11 U.S.C. 32(c) were not consistent.

Wherefore, your Petitioner respectfully requests the Court to set aside the Order denying the Petitioner a Dicharge in Bankruptcy and for all further relief as may be proper.

JOHN T. DIEDERICH
MICHAEL R. DOWLING
DIEDERICH, CLINE & WILHOIT
500 Price Building
Ashland, Kentucky 41101

Counsel for Petitioner

PROOF OF SERVICE

I, Michael R. Dowling, attorney for petitioner herein, hereby certify that on this 28th day of July, 1972, three copies of the Petition for Writ of Certiorari were mailed first class, postage prepaid, to Joe R. Massey, Jr., Ashland Discount Company, Inc., 203 Kitchen Building, Ashland, Kentucky 41101; John Simpson, Trustee, 2024 Winchester Avenue, Ashland, Kentucky 41101; and James E. Adkins, 2813 Louisa Street, Catlettsburg, Kentucky 41129, Attorney for Trustee. I further certify that all parties required to be served have been served.

Michael R. Dowling

MICHAEL R. DOWLING

APPENDIX

[CAPTION]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—

(Filed November 5, 1970)

This case is pending on specifications of objections to discharge of the bankrupt filed herein by Ashland Discount Company, Inc., by counsel. The grounds of objection to discharge are (1) that the bankrupt failed to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained; (2) that the bankrupt, within the year immediately preceding bankruptcy, transferred, removed, destroyed or concealed some of his property with intent to hinder, delay or defraud his creditors, and (3) that the bankrupt has failed to explain satisfactorily losses of assets or a deficiency of assets to meet his liabilities. Five separate hearings, in addition to the first meeting of creditors, have been held in the matter and the transcripts of all these hearings have been made a part of the record in support of the specifications of objections to discharge (Transcript of Testimony, October 9, 1969, pp. 66-67; 77).

Findings of Fact:

The bankrupt filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of Kentucky at Catlettsburg, Kentucky, on December 2, 1968. He listed liabilities of $195,671.10 and assets of $108,918.69. The statement of affairs to the petition reveals that a few months prior to bankruptcy the bankrupt was engaged in the used car business under the name of Paul Enyart, d/b/a Ashland Recovery, 1001 Winchester Avenue, Ashland, Kentucky, and also operated a hobby shop under the name of Model Raceway, 2100 29th Street, U. S. 23, Russell, Kentucky. According to the statement of affairs both of these businesses were terminated in June of 1968. The statement of affairs also reveals that in August, 1968,

the bankrupt sold a mobile home to Mary Walker, Ice Dam Hollow, Catlettsburg, Kentucky, for $3900. In October of 1968 he sold a mobile home to W. I. Cooper of Garrison, Lewis County, Kentucky, for $2200, and on November 20, 1968, he sold two mobile homes to Kenneth Tufts and Ronald Morrison of Westwood, Ashland, Kentucky, for $3500, of which $2850 was paid to Third National Bank of Ashland, Kentucky, in satisfaction of a loan secured by a security interest in the mobile homes. According to the statement of affairs the profit from the sale of the first two mobile homes was used to purchase parts and supplies for trailer repairs and for miscellaneous living expenses. There is no explanation as to the disposition of the $650 profit derived from the sale of the last two mobile homes two weeks prior to bankruptcy. Likewise, the statement of affairs makes no reference to the transfer of a 1969 Holiday Traveler Travel Trailer to the bankrupt's brother, Clifford Enyart. This trailer was brought into Kentucky on November 21, 1968, according to an affidavit supporting a license application for the vehicle. The application was signed by Clifford Enyart and notarized by the bankrupt, Paul Enyart. According to the testimony of the bankrupt, subsequent to the termination of the used car and hobby shop businesses in which he had been engaged, he earned his livelihood buying and repairing damaged trailers and reselling them for profit.

The bankrupt is an experienced businessman. In 1948 he was employed as a collection man in the field for a loan company, and in 1951 became manager of a small loan company office. He served in that capacity four years. He operated a small furniture business at Wurtland, Kentucky, for one and a half years. He has been in business for himself since 1960 (Transcript of Hearing, Dec. 10, 1969, pp. 45-46).

On or about January 1, 1964, he and Challie Yates, Jr., began operation of a used car lot in partnership under the

name of Ashland Recovery Service, 1001 Winchester Avenue, Ashland, Kentucky. Prior to that they had carried on a similar business for two or three months under the name of Yates Auto Mart, 11th Street and Greenup Avenue, Ashland, Kentucky. The automobiles on these car lots were floor planned with the objecting creditor, Ashland Discount Company, and many of the conditional sales contracts for sale of automobiles were in turn purchased by Ashland Discount Company with recourse (Transcript of Hearing, Feb. 17, 1969, pp. 40-41). During 1964 they sold 25 to 30 cars a week and sold $600,000 worth of cars that year. However, sometime during the year Yates informed the bankrupt that they were "out of trust" and in trouble with Ashland Discount Company in that they had sold approximately $30,000 worth of floor planned cars and had not delivered the money for the cars to Ashland Discount Company. In order to correct this situation Yates and the bankrupt personally obligated themselves on a note to Ashland Discount Company for $30,000. Thereafter, the bankrupt and Yates severed their partnership arrangement (Id. 48-52).

At the end of 1964 the bankrupt took over the business of Ashland Recovery Service and began operation of a used car lot under that name at 347 13th Street, Ashland, Kentucky. Yates stayed at 10th Street (1001 Winchester Avenue) under the name of Yates Auto Mart. Ashland Discount Company agreed to split the $30,000 note they had signed and accept a $15,000 note from each of them in substitution therefor. [sic] (Id. 54).

In May of 1965 Yates got in trouble again at the 10th Street location. The bankrupt was still responsible for some of the floor planned cars which were in Yates possession. So the bankrupt took over the lot from Yates and continued in business at both locations (Id. 54-56).

It was determined as a result of an accounting between the parties that as of December 23, 1966, the bankrupt was indebted to Ashland Discount Company in the amount of

$42,332.03. On that date the bankrupt executed to Ashland Discount Company three notes evidencing this indebtedness, one for $15,332.03, one for $13,000, and one for $14,000, all bearing interest at the rate of 7% per annum and payable consecutively in installments. To secure payment of these notes the bankrupt and his wife executed to Ashland Discount Company a mortgage of even date on eleven parcels of real estate. Several of these tracts of real estate had been conveyed to the bankrupt by his mother and father to enable the bankrupt to obtain financing for his used car venture. Also, Challie Yates had conveyed his interest to the bankrupt in certain parcels of real estate in which they had owned a joint interest.

Also on December 23, 1966, the bankrupt and his wife executed to Ashland Discount Company a note for $100,000. This note was secured by a separate mortgage of even date on the same parcels of real estate executed for the purpose of securing Ashland Discount Company from any losses that might arise from transactions entered into with Paul E. Enyart, and/or Ashland Recovery, wherein the mortgage "has or may be required to purchase or otherwise acquire any notes, conditional sales agreements, trust receipts, chattel mortgages, financing statements, security agreements, or other obligations or choses in action, bearing the signature as maker, endorser, grantor, acceptor, assignor, or in any other capacity."

Likewise, on December 23, 1966, the bankrupt, Paul E. Enyart, d/b/a Ashland Recovery and Ashland Discount Company entered into a dealer agreement under which Ashland Discount Company agreed to purchase installment notes and conditional sales contracts for sale of automobiles, to bona fide purchasers, and also entered into an agreement concerning reserve accounts to be maintained by Ashland Discount Company with respect to the purchase of instruments evidencing such sales.

On December 23, 1966, the bankrupt d/b/a Ashland Recovery, executed to Ashland Discount Company a financing statement covering the inventory of motor vehicles of the bankrupt. It is not clear whether a security agreement was executed covering the inventory of motor vehicles. As further security the bankrupt, his wife and the bankrupt's mother and father on December 23, 1966, executed a guaranty agreement jointly and severally guaranteeing payment of instruments executed by Paul E. Enyart, d/b/a Ashland Recovery, as maker, endorser, guarantor, acceptor or assignor.

On June 25, 1968, the bankrupt's used car business was terminated with the sale of the entire stock of approximately 50 motor vehicles to Fletcher Ramey, d/b/a Ramey Motors, Chapmansville, West Virginia, for the sum of $32,300. This sale and purchase was apparently financed by Ashland Discount Company with appropriate credit given the bankrupt on his indebtedness to that company. On the date of bankruptcy the bankrupt was indebted to Ashland Discount Company in the sum of $64,883.62, of which $24,654.61 accrued subsequent to December 23, 1966, and is evidenced by the $100,000 note executed December 23, 1966. The balance of $40,229.01 is the amount remaining due on the three notes representing indebtedness which accrued prior to December 23, 1966.

The bankrupt, by counsel, has filed objections to the proof of claim of Ashland Discount Company and a counterclaim for $100,000, on the grounds "(1) That various and divers agreements, guarantees and mortgages set forth in the claimant's proof of claim were procured by misrepresentation, over-reaching and duress, and are unconscionable. (2) The claimant engaged in deliberate, intentional and unfair business practices in derogation of its contractual duties and responsibilities all to the great injury of the bankrupt. (3) The claimant failed to make an accounting to the bankrupt, specifically of the contingent reserve

and the matter of charging this reserve, of monies derived from the operation of Ashland Recovery." The Court by order dated February 10, 1969, reserved a ruling on this objection on the ground it is the duty of the trustee to object to claims, and that other parties may not do so unless they first establish for the record that demand has been made upon the trustee to file such objections and the trustee has failed and refused to do so. There is no such showing in the record in this case. Moreover, the counterclaim asserted in behalf of the bankrupt in connection with this objection to the proof of claim of Ashland Discount Company is in the nature of a right of action upon contracts which passed to the trustee in bankruptcy under Section 70a(6) of the Bankruptcy Act, 11 U.S.C. Sec. 110a(6), and the Trustee is not asserting any such right of action at this stage of the proceeding.

The materiality of the issues raised by this alleged counterclaim to the issues raised by the specifications of objections to discharge is questionable. Although it is not clear from the record, apparently there is some contention in behalf of the bankrupt that his failure to keep books and records and his inability to explain satisfactorily losses of assets or a deficiency of assets to meet his liabilities is attributable, at least in part, to the alleged conduct of the objecting creditor in allegedly failing to properly account for reserve funds as provided for in the contracts between the parties.

On March 5, 1968, the bankrupt entered into an agreement with Bill Reeves of Huntington, West Virginia, under the terms of which Reeves was to equip a Model Raceway to be located on U. S. 23, Russell Bypass, Russell, Kentucky. The agreement provided that title to all stock and equipment would remain in Reeves until paid for by the bankrupt. It was further provided by the agreement that so long as the bankrupt was using Reeves' equipment he would not purchase any stock through any other distributor than

Reeves. The equipment covered by this agreement was valued at $1070. The principal items were an 8 lane slot car tract—purchase price $500, and 8 timer American slot car timer priced at $100. The bankrupt closed the Model Raceway in June, 1968, after having been in the business only three or four months. Thereafter, Reeves repossessed the inventory and some of the items of equipment covered by the agreement between the parties (Transcript of Testimony, Oct. 9, 1969, pp. 33-34; Exhibit O to Transcript of Testimony, Mar. 10, 1969). (See also Transcript of Testimony May 27, 1969, pp. 44-62).

Prior to and subsequent to December 23, 1966, the bankrupt received rental income from several of the eleven parcels of real estate described in the mortgages executed on that date to Ashland Discount Company. As shown by these mortgage contracts, most of the parcels of real estate were subject to prior encumbrances. Also, as recited in the mortgage agreements most of these parcels of real estate were acquired by the bankrupt in 1964 and 1965. According to Item 5 of the statement of affairs the rental income per annum was as follows: 2104 Washington St., $660; 10 Senca St., $960; 309-311 7th St., $1200; 258 Winchester Ave., $360. At one time the bankrupt maintained a bank account in the name of Ashland Recovery Real Estate for the deposit of rent monies (Transcript of Hearing Dec. 10, 1969, p. 44).

Between June, 1968, when the bankrupt terminated his used car and Model Raceway businesses, and the date of bankruptcy, the bankrupt engaged in the business of buying salvaged or damaged mobile homes and trailers and repairing them for resale (Transcript of Testimony, Oct. 9, 1969, pp. 25-32). As revealed by the statement of affairs to the petition in bankruptcy, the bankrupt sold several trailers during this period. According to his testimony he bought four or five trailers at one time in August, 1968, which he planned to rent. He had the trailers assigned to Ashland

Recovery Real Estate. According to the bankrupt he used this bank account because he figured Morgan Driveways the transport company would give "us a better transport deal" (Transcript of Hearing, Dec. 10, 1969, pp. 44-45).

In October, 1969, the bankrupt submitted a bid of $1251 to Foremost Insurance Company of Grand Rapids, Michigan, on a 1969 Holiday Traveler Travel Trailer, which was being sold for its salvage value. The trailer was located at Ashland, Ohio (Transcript of Hearing, May 27, 1969, pp. 33-44; Transcript of Testimony, March 10, 1969, p. 76). The bankrupt was the high bidder. On November 15, 1968, Henry Clark, Salvage Manager for Foremost, had dinner with the bankrupt at a local Holiday Inn, and on that occasion executed a blank bill of sale to the trailer (Id. p. 35). The blank bill of sale was notarized by the bankrupt, who was or is a notary public (Id. p. 36, Exhibit N to the Transcript of May 27, 1969). The bankrupt did not pay for the trailer at the time he received the blank bill of sale. This was because by custom he was permitted to deduct any storage charges from the amount of the bid and remit Foremost the net amount, which could not be determined until the trailer was picked up and the storage paid (Transcript of May 27, 1969, pp. 33-34).

The bankrupt was unable to obtain the money to pay for the trailer. His brother agreed to borrow the money and honor the bid (Transcript of Hearing, Dec. 10, 1969, pp. 78-79). On or about November 21, 1968, the bankrupt typed the name of his brother, Clifford Enyart, in the blank bill of sale and gave it to him to take to the office of the Clerk of Greenup County to obtain a license for the trailer (Transcript of Testimony, May 27, 1969, pp. 34-37; Exhibit N). On November 21, 1968, the bankrupt notarized for his brother an affidavit supporting vehicle license application. This application states that the vehicle described therein (the space provided for describing the vehicle is blank) was brought into Kentucky

on November 21, 1969. Sometime after this date Harold Borders of Westwood picked up the trailer and brought it into Kentucky, and parked it in the bankrupt's back yard. It was parked there when the bankrupt filed bankruptcy on December 2, 1968 (Transcript of Hearing, May 27, 1969, pp. 30-34). The trailer was not listed as an asset in the bankruptcy petition. The transfer of title to the trailer to the brother on November 21, 1968, is not set out in the statement of affairs. Other trailer sales made in a similar manner within the year immediately preceding bankruptcy are also omitted from the statement of affairs (Transcript of Testimony, May 27, 1969 pp. 25-29).

On the date of bankruptcy, December 2, 1968, the bankrupt maintained a checking account in the Second National Bank of Ashland, Kentucky in the name of Ashland Recovery. The balance in the account on that date was 67¢. On December 6, 1968, the bankrupt wrote a check on this account for $348.16 payable to Holiday Rambler. (Exhibit M to Transcript of Testimony, March 10, 1969). This check was for the purchase of materials, outside metal, for repair of the 1969 Holiday Traveler Travel Trailer (Transcript of Testimony, May 27, 1969, p. 34).

On December 9, 1968, the bankrupt's brother, Clifford Enyart, borrowed the sum of $1250 from First and Peoples Bank of Russell, Kentucky, and in connection therewith executed a security agreement conveying to the bank a security interest in the 1969 Holiday Traveler Travel Trailer. This security agreement was lodged for record in the office of the Greenup County Clerk on December 11, 1968, and was duly noted on the certificate of registration and ownership which had been issued to Clifford Enyart when the vehicle was licensed on November 21, 1968 (Exhibit N of the Transcript of Testimony, March 10, 1969).

On December 9th or 10th, 1968, Clifford Enyart delivered to the bankrupt the proceeds of the loan from the

First and Peoples Bank of Russell, Kentucky, in the amount of $1250, plus an additional $275, or a total sum of $1525, which the bankrupt deposited to the account of Ashland Recovery in the Second National Bank of Ashland, Kentucky, on December 10, 1968. On the previous day, December 9, 1968, the bankrupt had written a check on this account to Foremost Insurance Company in the amount of $1171 in payment of the net balance due on his bid of the 1969 Holiday Traveler Travel Trailer after credit for an $80 storage bill which had apparently been paid when the trailer was picked up. The check to Foremost was paid by the bank on December 16, 1968; the check to Holiday Rambler in the amount of $348.16 cleared the bank on December 20, 1968. This left a balance of $5.97 in the Ashland Recovery Account (Exhibit M to the Transcript of Testimony, March 10, 1969) (Transcript of Testimony March 10, 1969, pp. 60-61).

On or about the date of bankruptcy the bankrupt had in his possession a 1955 Thunderbird, eight cylinder Ford automobile. This car is identified as a classic, a collector's item, with the value of approximately $2500 (Transcript of Testimony, May 27, 1969, pp. 62-64).

The bankrupt acquired the car from Benny Christian, another dealer who had owned it and owed Ashland Discount some money on it. (Transcript of Testimony, Oct. 9, 1969, pp. 36-37). The car was transferred from Benny Christian's floor plan to the bankrupt's floor plan with Ashland Discount Company in 1966 (Transcript of Testimony, Dec. 10, 1969, pp. 63-64). According to the bill of sale (Exhibit #5 to Transcript of Testimony, Dec. 10, 1969) which was executed by M. L. McNeal on March 12, 1966, the car was apparently acquired by the bankrupt on or about that date. The bankrupt kept the car approximately two years (Transcript of Testimony, Dec. 10, 1969, p. 64).

On February 24, 1968, the bankrupt, d/b/a Ashland Recovery, sold the 1955 Thunderbird automobile to Charles W. Meade, Jr., 1354 Florence St., Ashland, Kentucky, for $3295 plus tax of $40, making the total sales price $3335. As part of the purchase price Meade traded in a 1964 Chevrolet El Camino Pickup truck and gave Enyart a personal check for $1140 (Exhibit #4, Transcript of Testimony, Dec. 10, 1969). The car was transferred to Meade by inserting his name in the blank bill of sale executed by McNeal on March 12, 1966 (Exhibit #5, Transcript of Testimony, Dec. 10, 1969), (Transcript of Testimony, Dec. 10, 1969, pp. 69-74).

Before Meade took delivery of the car he became ill and died. His widow asked the bankrupt to sell the car (Transcript of Testimony, Dec. 10, 1969, pp. 64-65; Transcript of Testimony, Oct. 9, 1969, p. 38; Transcript of Testimony, May 27, 1969, pp. 67-69).

The bankrupt paid off the floor plan on the 1955 Thunderbird automobile on October 30, 1968 (Transcript of Testimony, May 27, 1969, pp. 70-71). The amount of the pay off was approximately $1300. The bankrupt retained the proceeds from the sale of the automobile on February 24, 1969, and used it to pay off a floor plan for another automobile and to pay rent (Transcript of Testimony, Dec. 10, 1969, p. 75). He paid off the floor plan to Ashland Discount Company eight months later on October 30, 1969, with funds from other sources. The source of the funds for this payment is not apparent from the record. In October or November 1969, the bankrupt delivered the 1955 Thunderbird automobile to Mrs. Meade (Transcript of Testimony, Oct. 9, 1969, p. 43).

On the date of bankruptcy the bankrupt was the owner of two Equitable Life Assurance Society Insurance policies Nos. 13777612 and 13777613 issued June 4, 1952, naming his children, Paula J. Enyart and Michael D. Enyart, as the insured parties. The policies had cash and dividend values

in the approximate total sum of $400 to $420 on the date of bankruptcy (Transcript of Testimony, Oct. 9, 1969, pp. 2-4). The bankrupt did not list these policies as assets in the schedules to the petition in bankruptcy (Id. p. 48). According to the bankrupt the fact these policies were in effect "slipped" his mind. When the daughter married he turned over to her the policy on her life with the understanding that she would pay the premium, and did likewise with the policy on the son when he got married (Transcript of Testimony, Dec. 10, 1969 pp, 62-63).

The bankrupt also failed to list as assets in the schedules to the bankruptcy petition several real mortgages which had been executed to Ashland Recovery or Ashland Recovery Service as additional security in connection with the sale of automobiles. The mortgages are filed as Exhibits C through L to the Transcript of Testimony taken March 10, 1969 (See also Transcript of Testimony, March 10, 1969, pp. 38-57). However, counsel for the trustee has reported to the Court, and it appears from the record, that several of these mortgages had been paid off prior to the date of bankruptcy, and that the mortgages were of no value to the estate (Transcript of Testimony, May 27, 1969, pp. 2-4).

The bankrupt admits he has not filed State and Federal income tax returns for the calendar years of 1965, 1966, 1967 and 1968 Transcript of Testimony, Oct. 9, 1969, pp. 14, 22-23). Neither is it clear that he filed State and Federal withholding tax returns for those years (Id pp. 5-6).

The bankrupt maintained three bank accounts: One in the name of Ashland Recovery Auto Sales in the First National Bank of Ironton, Ohio; one in the name of Ashland Recovery in the Second National Bank of Ashland, Kentucky, and a joint personal bank account with his wife in First and Peoples Bank of Russell, Kentucky. He used all these accounts rather indiscriminately in the con-

duct of his business affairs (Id. pp. 14-15). He has not produced all the canceled checks written on these accounts. (Transcript of Testimony, Oct. 9, 1969, p. 77).

The bankrupt maintained a ledger book of everything paid by check, by date, check number, payee and amount (Id. p. 15), but there are no entries in the ledger book for the eleven months of the year 1968 preceding bankruptcy (Id. p. 18).

The bankrupt testified he had receipt books showing his income from rental property, but the receipts had not been entered in a ledger book and had not been turned over to the trustee at the time of the initial hearing on the specifications of objections to discharge on October 9, 1969 (Id. pp. 20, 77-79). The bankrupt did not have any composite record of income, expenses for taxes and upkeep, depreciation or net profit from rental property (Id. pp. 20-21).

The bankrupt did not keep a copy of the bill of sale to each car he sold (Id. p. 21). He testified he had copies of the financing statements covering the cars he had sold during 1967 and 1968, but these documents had never been delivered to the trustee, or to the bankrupt's accountant (Id. pp. 21-22). There was no separate record of cash payments received by the bankrupt as down payments on the purchase of cars, other than as noted on the purchase order covering the sale of cars (Id. p. 23). The bankrupt did not keep ledger cards covering the sale of cars for which he was paid in installments but merely noted receipts on the sales slips (Id. p. 23). None of these records have been turned over to the trustee (Id. p. 24). The bankrupt had no record of the total amount of automobile sales for the years of 1966, 1967 and 1968 (Id. p. 25).

The bankrupt had no record of his gross income from trailer sales during 1968. His testimony was that he would have to reconstruct this from canceled checks and receipts on a month by month basis. However, he ad-

mitted that the income from trailer sales was used for living expenses and might not have gone into any checking account (Id. pp. 25-28). He did not have copies of the bills of sale to the trailers he had sold. There were apparently some written contracts of sale covering these transactions (Id. pp. 30-31). (Transcript of Testimony, Dec. 10, 1969, pp. 16-17).

The bankrupt kept no written inventory of the Model Raceway business at Russell, Kentucky (Id. p. 34). He produced no books or records relating to that business, other than the agreement filed as Exhibit O to the Transcript of Testimony of March 10, 1969, covering acquisition of the equipment for the business.

On one occasion the bankrupt collected $1200 or $1300 in full payment for an automobile which had been sold to a Mr. Cline. The purchase contract had been assigned to Ashland Discount. The bankrupt misappropriated this payment and paid it out in cash (Id. pp. 50-52).

The bankrupt had no record of how many cars financed with Ashland Discount Company with recourse had been repossessed and returned to his car lot during the years 1966, 1967 and 1968 (Id. pp. 53-54).

The bankrupt had no record of the amount of money he withdrew from the used car business for personal living expenses for the years of 1966, 1967 and 1968, and admittedly did not submit a list of the inventory of the car lot or other assets to the local taxing authorities for those years as required by local and taxing authorities for those years as required by local and state laws (Id pp. 56-57).

Counsel for the bankrupt conceded that information from the bankrupt's records had not been collated, and had been neglected for several years (Transcript of Testimony, Oct. 9, 1969, p. 767).

The objecting creditor concluded its proof in support of the specifications of objections to discharge at the

initial hearing on the objections to discharge held October 9, 1969. At the conclusion of the case for the objecting creditor the Court continued the hearing until December 10, 1969, to afford the bankrupt an opportunity to offer proof in response to the objections to discharge. On the latter date the bankrupt moved for a further continuance of the hearing on the grounds the accountant engaged by the bankrupt had not had sufficient time to put the bankrupt's books and records in order. This motion was overruled by the Court (Transcript of Testimony, Dec. 10, 1969, pp. 1-24).

The Court ruled that the objecting creditor had established to the satisfaction of the Court that there are reasonable grounds for believing the bankrupt had committed an act which would prevent his discharge in bankruptcy in that the bankrupt had failed to keep and preserve adequate books and records from which his financial condition and business transactions might be ascertained, and that the burden of proving he had not committed any such act was upon the bankrupt.

Basically, the explanation of the bankrupt for his failure to keep his records in good order is that he was trying to run a seven or eight man used car operation by himself because he had no money with which to hire any help due to his heavy financial commitment to the objecting creditor, so that there was simply no time to devote to the record keeping process (Transcript of Testimony, Dec. 10, 1969, pp. 27-33).

In 1965 the bankrupt employed a Mr. C. J. Rice to do his tax work and keep books. However, for some reason the bankrupt did not discover until 1967 that Mr. Rice was not performing this duty (Transcript of Testimony, Oct. 9, 1969, pp. 68-70).

On or about the date of the filing of the specifications of objections to discharge on July 31, 1969, the bankrupt

contacted a CPA about putting the bankrupt's books and records in order (Transcript of Testimony, Dec. 10, 1969, pp. 14-15). However, the CPA did not receive the bankrupt's records and actively begin working on them until 60 to 70 days later, after the initial hearing on the specifications of objections to discharge held October 9, 1969 (Id. p. 8).

According to the CPA, the bankrupt has the basic supporting records, such as canceled checks, deposit tickets, contract sales, copies of finance agreements, etc., necessary for compilation of his financial transactions (Id. p. 9). However, the CPA also found some of the transactions to be of a very unusual nature so that an ordinary layman would not be able to properly record them in books of account (Id. p. 9). The CPA was of the opinion that an interested creditor or trustee could not have ascertained the financial condition of the bankrupt from the records in the condition they were delivered to the CPA (Id. p. 16). Also, the record shows that the bankrupt made frequent withdrawals from the used car business in the form of cash, and the record is unclear as to how these withdrawals were accounted for (Id. pp. 53, 59-61).

Conclusions of Law:

The Court is of the opinion the specifications of objection to discharge based on the allegations that the bankrupt failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained should be, and hereby is, sustained. The objecting creditor established (1) that the bankrupt has not filed State and Federal income tax and withholding tax or local tax returns for several years; (2) that the bankrupt did not maintain a receipts ledger for any of the several businesses in which he was engaged; (3) that the disbursements ledger was not posted for the year 1968, although the bankrupt engaged in the used car business from January to June, 1968, operated a Model

Raceway and hobby shop from about March 5 until June, 1968, and engaged in the business of buying damaged trailers for resale from August, 1968, until the date of bankruptcy and thereafter; (4) that the bankrupt maintained at least three separate bank accounts which he drew upon rather indiscriminately in the transaction of his business affairs; (5) that the bankrupt made cash withdrawals from the used car business and realized cash from trailer sales which has not been adequately accounted for; (6) that the bankrupt misused funds realized from the sale of cars under floor plan to the objecting creditor; (7) that the bankrupt had retained possession of a substantial portion of his records and had made no real effort to put them in acceptable form prior to the initial hearing on the specifications of objections to discharge. On the basis of this showing the Court ruled there was reasonable grounds for believing the bankrupt had committed an act which would prevent his discharge in bankruptcy by failing to keep or preserve books or records from which his financial condition and business transactions might be ascertained and that the burden was upon the bankrupt to prove that he had kept and preserved such books and records.

The Court is of the opinion that the bankrupt has failed to meet this burden. Some eleven months after bankruptcy, after the specifications of objections to discharge had been pending more than 60 days, and after the initial hearing thereon, he delivered to a CPA an assortment of canceled checks, bank statements, car and trailer sales contracts and other documents relating to his business transactions covering an unspecified period of time. Some 30 days later at the continued hearing on the specifications of objections to discharge the CPA was uncertain as to whether these records were adequate because of the unusual nature of some of the transactions between the bankrupt and the objecting creditor relating to payment for floor planned cars. Further doubt as to the adequacy

of the record is raised by the fact that the bankrupt made frequent cash withdrawals to meet current living expenses.

The bankrupt is an experienced businessman. The inadequacy of his records cannot be justified on the grounds of ignorance.

As pointed out by the Court In re Romano, 196 F. Supp. 954, (1961), at page 958, a mass of unorganized, mixed and miscellaneous records could be as confusing as no records. The bankrupt cannot fulfill his burden by dumping a great volume of miscellaneous papers upon the trustee and leaving completely to the trustee the responsibility for fitting the jig-saw together and determining if all the pieces are there. Some organization of the voluminous records can be as much a part of record keeping as the existence of the records themselves.

The fact that the bankrupt has produced a miscellany of bank deposit slips, check stubs, canceled checks and like material does not necessarily establish that the bankrupt has accounted for receipts and disbursements from his business ventures in the years preceding bankruptcy. Hilliard v. Hollins, 290 F. 2d 263 (1961).

The Court is satisfied from the record herein that the bankrupt has not met the burden of proving that he kept or preserved books of account or records, from which his financial condition and business transactions might be ascertained, and that his failure to do so is not justified under the circumstances of this case.

Under the specification of objection to discharge based on allegations that within one year of bankruptcy the bankrupt transferred, removed, destroyed, or concealed property with intent to hinder, delay or defraud his creditors the objecting creditor alleges it refers the Court to "the divers real estate mortgages, a lawsuit thereon, the trailer purchase, the payment thereof and the Thunderbird automobile. Bankrupt has testified he had no insurance policies. Claimant herein has reasonable grounds to

believe that the bankrupt has two policies of life insurance, and that there is the concealment of the rental income."

The Court has found that the real estate mortgages obtained by the bankrupt as additional security in connection with the sale of automobiles were of little, if any, value.

The transfer of the 1969 Holiday Traveler Travel Trailer to the bankrupt's brother, Clifford Enyart, on or about November 21, 1968, cannot be said to have been with intent to hinder, delay or defraud creditors since the bankrupt received fair value for the trailer. However, the bankrupt is accountable for the proceeds from the sale which he received and disbursed after bankruptcy even though he may have done so on the advice of counsel. The Court rejects the contention that title to the trailer was never in the bankrupt, since this argument obtains validity only if the Court should condone violation of vehicle registration laws, and further because the evidence is clear that in making the sale the bankrupt was acting in his own behalf rather than as an agent of Foremost Insurance Company.

With respect to the transfer of the 1955 Ford Thunderbird automobile on February 24, 1968, to Charles W. Meade, this appears to have been a transfer for fair value in the ordinary course of business. It is true that the bankrupt misappropriated the proceeds of the sale and did not pay the objecting creditor for release of lien on the vehicle until October 30, 1968, after which he delivered the vehicle to the purchaser's wife as administrator of the deceased purchaser's estate. However, taken as a whole the facts are insufficient to support the conclusion that this transaction was made with intent to hinder, delay or defraud creditors.

The Court ruled that the objecting creditor had established a prima facie case with respect to the failure of the bankrupt to list two Equitable Life Assurance Society

Insurance policies as assets in the schedules to the bankruptcy petition, and that the burden was upon the bankrupt to explain his failure to do so. The Court is satisfied on the basis of the explanation of the bankrupt that the existence of the policies "slipped" his mind, that his failure to list the policies was due to oversight, and that the evidence is insufficient to support a conclusion that the bankrupt omitted listing the policies with intent to hinder, delay or defraud his creditors.

Although the Court has ruled that the bankrupt has failed to keep and preserve adequate books and records with respect to his income, including rental income, the evidence is not sufficient to support a conclusion that the bankrupt concealed the existence of the rental income. The existence of such income is revealed by Item 5 of the statement of affairs to the petition in bankruptcy.

WHEREFORE: The Court is of the opinion that the specifications of objection to discharge of the bankrupt based on the allegation that within a year of bankruptcy he transferred, removed, destroyed, or concealed property with intent to hinder, delay or defraud his creditors should be, and hereby is, overruled.

The specification of objection to discharge based upon the allegation that the bankrupt has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities likewise should be, and hereby is, overruled. This specification is based on the transaction with respect to the 1955 Ford Thunderbird automobile. That transaction has been explained to the satisfaction of the Court.

WHEREFORE: The Court is of the opinion that the bankrupt should be, and hereby is, denied a discharge in bankruptcy in this proceeding for his failure to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained.

IT IS ORDERED that copies of this order be served by mail upon the parties shown below.

At Lexington, Kentucky, this November 5th, 1970.

/s/ JOE LEE
Referee in Bankruptcy

Copies to:

Michael Dowling
Attorney for Bankrupt

Joe R. Massey, Jr.
Attorney for Objecting Creditor

John Simpson
Trustee

James E. Adkins
Attorney for the Trustee

It is ordered that copies of this Finding of Facts, Conclusions of Law, and Orders be served by mail upon the parties listed below.

Dated at Lexington, Kentucky this the 31st day of December, 1970.

On its own motion the Court extends the time to appeal from this order until January 20, 1971.

/s/ JOE LEE
Referee in Bankruptcy

COPIES SERVED BY MAIL UPON:

Michael Dowling
Attorney for Bankrupt

Joe R. Massey, Jr.
Attorney for the Objecting Creditor

John Simpson
Trustee

James E. Adkins
Attorney for the Trustee

[CAPTION]

MEMORANDUM OPINION—(Filed July 6, 1971)

This matter is before the Court on a Petition for Review, pursuant to 11 U.S.C. 67(c) of an Order of the Referee in Bankruptcy, denying the bankrupt a discharge in bankruptcy and on a similar petition for review of Orders of the Referee ordering the bankrupt to pay over to the Trustee in Bankruptcy the sum of $1,525.00 representing proceeds received by the bankrupt after bankruptcy from the sale prior to bankruptcy of a 1969 Holiday Traveler travel trailer and provisionally allowing the claim of Ashland Discount Company as a secured claim in the amount of $64,883.62, subject to the requirement that said creditor marshall the security disclaimed by the Trustee in Bankruptcy as a prerequisite to receiving any dividend on the claim.

The Referee's Order denying the bankrupt a discharge in bankruptcy was the result of specifications of objections to discharge filed by Ashland Discount Company and was grounded upon the failure of the bankrupt to keep or preserve books of account or records from which his financial condition and business transactions might be ascertained. 11 U.S.C. 32(c). From the record, including the transcripts of testimony given in five separate hearings held in connection with the subject bankruptcy, it appears that prior to bankruptcy the bankrupt was engaged primarily in the used automobile business. Most of his inventory was "floor planned" with the objecting creditor, and many of his dealings, both with the creditor and which his customers, were done in transactions of unorthodox form. A certified public accountant testified, in effect, the bankrupt had not kept books in the ordinary sense; that the

bankrupt's records were insufficient, particularly in view of the unorthodox form of some of the transactions involving the bankrupt, for an outsider or a layman to ascertain his financial condition or ascertain his transactions; but that it would probably be possible to make a reconstruction of the bankrupt's affairs if Ashland Discount Company's records were made available to the bankrupt (Tr., Dec. 10, 1969, pp. 14-25). While it is true that 11 U.S.C. 32(c) does not require that books or records be kept in any particular fashion, the statute does contemplate that the bankrupt, to be entitled to a discharge in bankruptcy, must maintain such records that his financial condition may be reasonably ascertained and from which his business transactions may be traced for a reasonable period into the past. While the requirement may be relaxed upon a showing of sufficient justification, it is obvious that in the instant case the bankrupt has failed to keep adequate records of his affairs, or to offer a reasonable justification for his failure to do so, and that the denial of a discharge in bankruptcy to the bankrupt was entirely warranted. *Burchett* v. *Myers*, 202 F. 2d 920 (9th Cir. 1953).

The Referee's Order requiring the bankrupt to pay over the sum of $1,525.00 to the Trustee in Bankruptcy results from a transaction involving the sale of a 1969 Holiday Traveler travel trailer. It is apparently undisputed that prior to bankruptcy the bankrupt bid on the trailer and was given a bill of sale thereto, executed in blank by the seller. Subsequent to bankruptcy, the bankrupt's brother, whose name had been inserted prior to bankruptcy in the bill of sale, borrowed sufficient funds to purchase the trailer, and paid the money to the bankrupt. Although the bankrupt contends that his brother had merely honored the bankrupt's bid for him and that the trailer never really belonged to the bankrupt, it appears that the bankrupt had

regularly utilized the same scheme in the conduct of his used car business, and, in any event, it is clear that on the date of bankruptcy the bankrupt had physical possession of the trailer and was, at that time, either the owner of the trailer or entitled to the proceeds from the sale thereof. In either event the Trustee would be entitled to the trailer or the proceeds from the sale thereof received by the bankrupt subsequent to the date of bankruptcy. Having received and dispersed said proceeds subsequent to bankruptcy, the bankrupt is now accountable for same to the Trustee in Bankruptcy.

The Bankrupt's contention concerning the allowance of the claim of Ashland Discount Company as a secured claim is that such allowance defeats the right of the bankrupt to contest the indebtedness giving rise to said claim. Inasmuch as General Order 21(6) of the General Orders in Bankruptcy provides specifically and in detail that the bankrupt can petition for the reconsideration of the allowance of a claim against the bankruptcy estate and is entitled to call witnesses and be heard in connection with such a petition, it is clear that the bankrupt has not been prejudiced by the provisional allowance of the claim of Ashland Discount Company as a secured claim.

For the foregoing reasons, the Order of the Referee in Bankruptcy sustaining an objection to the discharge of the bankrupt and denying the bankrupt a discharge in bankruptcy, the Order of the Referee in Bankruptcy ordering the bankrupt to pay over to the Trustee in Bankruptcy the sum of $1,525.00 representing the proceeds received by the bankrupt subsequent to bankruptcy from the sale of a 1969 Holiday Traveler travel trailer, and the Order of the Referee in Bankruptcy provisionally allowing the claim of Ashland Discount Company as a secured claim in the amount of $64,883.62, should be approved and confirmed.

An Order in conformity herewith will be this day entered.

This the 6th day of July, 1971.

/s/ BERNARD T. MOYNAHAN, JR., *Judge*

cc: Joe Lee
Michael Dowling mailed 7/6/71
mpe

Before: WEICK and MILLER, Circuit Judges, and RUBIN*, District Judge.

Paul E. Enyart, who had voluntarily petitioned for a discharge in bankruptcy, appeals from a district court order affirming a referee's order denying such discharge. Discharge was denied pursuant to Section 14(c)(2) of the Bankruptcy Act, 11 U.S.C.A. §32(c)(2). The referee determined that Enyart failed to keep books of account or records from which his financial condition and business transactions might be ascertained, and further determined that, under all of the circumstances of the case, said failure was not justified. Enyart objected to and now appeals from those determinations. Enyart also objects to an order of the referee finding him accountable to the bankrupt estate for the proceeds resulting from a transaction involving the sale of a travel trailer which were disbursed to appellant's brother after the filing of the petition in bankruptcy.

The referee concluded that Enyart failed to file either State or Federal income tax and withholding tax or local tax returns for several years, did not maintain a receipts ledger for any of the several businesses in which he was engaged; maintained three separate bank accounts which he used indiscriminiately for business and personal purposes; and made no real effort to put his records in an

*Honorable Carl B. Rubin, United States District Judge for the Southern District of Ohio, sitting by designation.

acceptable form prior to the initial hearing on the specifications of objections to discharge. After five hearings, the referee concluded that Enyart had failed to carry his burden, under Section 14(c)(2) of the Bankruptcy Act, of showing that his financial condition and business transactions might be ascertained. The applicable principle is that while a bankrupt's books need not be in perfect order nor follow any particular accounting system, they must be susceptible to reconstruction by a competent accountant without expending unlimited amounts of time or funds. See, *Hilliard* v. *Hollins*, 290 F. 2d 263 (6th Cir. 1961); *Noroian* v. *Hern*, 422 F. 2d 1092 (9th Cir. 1970); *In re Romano*, 196 F. Supp. 954 (E.D. Tenn. S.D. 1961).

The record fully supports the referee's conclusions and the district court's affirmance. It is well established in this Circuit that "concurrent findings of the Referee in Bankruptcy and the district judge are not to be set aside, except upon clear demonstration of mistake." *Cunningham* v. *Elco Distributors*, 189 F. 2d 87 (6th Cir. 1951); *Hilliard* v. *Hollins, supra*, at 265; *Morehead* v. *Greenville Supply Company*, 439 F. 2d 962 (6th Cir. 1971); *In re Newman*, 92 F. 2d 108 (6th Cir. 1938).

We find neither clear mistake nor abuse of discretion in the action of the Referee and the district judge as to either of the asserted grounds of appeal.

The judgment of the district court is therefore affirmed.

Entered by order of the Court.

/s/ JAMES A. HIGGINS, *Clerk*

TABLE OF CONTENTS

		PAGE
I.	Opinions Below	1
II.	Jurisdiction	2
III.	The Questions Presented	2– 3
IV.	Statutes Involved	4– 5
V.	The Material Facts Constituting the Case	5–15
VI.	Argument	15–23
VII.	Conclusion	24
Proof of Service		25

TABLE OF AUTHORITIES

Cases: PAGE

Ginzburg v. Johansen (CA-5, 1962), 300 Fed. 2d 40, CCH Dec. 60, 341 18

Hillard v. Hollens, 290 Fed. 2d 263, 265 (6th Cir. 1961) 21–22

In Re Berkowitz (U.S.D.C. S.D. of N.Y., No. 89745, 11 June 1965), CCH Dec. 61, 395 18–19

In Re Case (D.C. N.Y. 1961), CCH Dec. 60, 218 19

In Re Duca (D.C. N.Y. 1958), CCH Dec. 59, 252 20

In Re Kay (D.C. N.Y. 1962), CCH Dec. 60, 350 19–20

In Re Kenney (D.C. E. D. of Tenn. N.E. Div. No. 8842, 9 August 1968), CCH Dec. 63, 013 21

In Re Rose (D.C. N.Y. 1943), CCH Dec. 54, 360 18

In Re Rubin (D.C. E.D. of Pa. No. 25974, September 24, 1964), CCH Dec. 61, 239 20–21

In Re Shapiro (D.C. P.S. 1953), 110 Fed. Supp. 228, CCH Dec. 57, 787 19

Nis v. Sternberg, 388 Fed. 2d 611, 612 (8th Cir. 1930) 22

Statutes:

Title 28 U.S.C. 1254(1) 2

Title U.S.C. 45(c) 2

11 USC 32(b) 4

11 USC 32(c)(2) 4

11 USC 32(c)(7) 5

11 USC 32(c) 15–16

SUPREME COURT OF THE UNITED STATES

No. _____

PAUL E. ENYART, Bankrupt
PAUL E. ENYART - - - - - *Petitioner*

v.

ASHLAND DISCOUNT COMPANY
JOHN SIMPSON, Trustee - - - *Respondents*

JOINT BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

May it please the Court:

I. OPINIONS BELOW

This is a Brief in opposition of the Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, judgment made and entered May 1, 1972. Copies of the Referee in Bankruptcy's Order, the memorandum opinion of the District Court, and the opinion of the United States District Court of Appeals for the Sixth Circuit are set out in full in the Appendix to the petition filed by the petitioner and for that reason are not contained herein.

II. JURISDICTION

The jurisdiction of the Court is based upon Title 28 U.S.C. 1254(1) and Title U.S.C. 45(c).

III. THE QUESTIONS PRESENTED

I.

Did the Referee in Bankruptcy err in the Order dismissing the petition in bankruptcy and was the District Court, the Honorable Bernard T. Moynahan, Jr., Judge, and the Sixth Circuit Court of Appeals wrong when all three found that the creditor had failed to comply with the Section 14c of the Bankruptcy Act which requires that the bankrupt keep or preserve books of account or records from which his financial condition and business transactions might be ascertained?

II.

Did the Referee in Bankruptcy abuse his discretion and deny the bankrupt the right to be fully heard by refusing to grant the CPA hired by the bankrupt forty-five (45) additional days when the bankrupt had had more than a year to present his records?

III.

Is there a reason for granting certiorari under Rule 19 of the Supreme Court where there is no conflict of decisions within another Circuit on the same matter or that some important question of Federal law should be settled by this Court?

IV.

Was the Bankrupt-Appellant entitled to notice that he would be required to have available his records in accordance with good housekeeping practices when the only request for the production of any of his records during the course of the proceeding was the Referee's Order prior to the first meeting of creditors directing the production of records for six (6) months immediately preceding the filing of the bankruptcy petition?

V.

Is it equitable to deny the Bankrupt-Appellant a discharge in bankruptcy for inadequate records to financial transactions dictated and controlled by the objecting Creditor-Respondent, especially since the Trustee in Bankruptcy and the objecting Creditor-Respondents agreed to follow up these transactions with the concurrence of the Referee in Bankruptcy to determine whether there was any impropriety involved?

VI.

Whether a bankrupt who on the date of bankruptcy has a sum of money due him on a contract of sale and subsequent to bankruptcy collects the sum due on said contract before the Trustee in Bankruptcy acquires knowledge to the transaction and disburses the proceeds so received to a creditor of the bankrupt of his own choice, can be required to account to the Trustee for the amount of the sum wrongfully received and disbursed?

IV. STATUTES INVOLVED

11 USC 32(b):

"After the bankrupt shall have been examined, either at the first meeting of creditors or at a meeting specially fixed for that purpose, concerning his acts, conduct, and property, the court shall make an order fixing a time for the filing of objections to the bankrupt's discharge, notice of which order shall be given to all parties in interest as provided in section 94 of this title. Upon the expiration of the time fixed in such order or of any extension of such time granted by the court, the court shall discharge the bankrupt if no objection has been filed; otherwise, the court shall hear such proofs and pleas as may be made in opposition to the discharge, by the trustee, creditors, the United States attorney, or such other attorney as the Attorney General may designate, at such time as will give the bankrupt and the objecting parties a reasonable opportunity to be fully heard."

11 USC 32(c)(2):

"The court shall grant the discharge unless satisfied that the bankrupt has destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case."

11 USC 32(c)(7):

"The court shall grant the discharge unless satisfied that the bankrupt has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

Order 32. General Orders in Bankruptcy:

"Any person opposing a discharge shall, on or before the time fixed for the filing of objections to the discharge, file a specification in writing of the grounds of his opposition."

V. THE MATERIAL FACTS CONSTITUTING THE CASE

The Petitioner filed a voluntary petition in Bankruptcy in the United States District Court for the Eastern District of Kentucky at Catlettsburg on 2 December 1968. The Court by proper Order directed the Petitioner to produce the following records and to do the following as set forth in said order:

(1) Attend the creditors meeting.

(2) Submit to an examination under oath concerning the conduct of your affairs.

(3) Cause of your bankruptcy.

(4) Your transactions with creditors and other persons.

(5) The amount, kind and whereabouts of your property, and all other matters which may affect the administration and settlement of your estate.

(6) Or, the granting of your discharge.

FURTHER: Produce for inspection of the Court and creditors:

(7) All books and records of accounts, bank books, bank statements, [sic] check books, cancelled checks for the six months preceding bankruptcy.

(8) Original or certified copies of deeds or contracts under which you hold title to any interest in real estate.

(9) Certified copies of all mortgages and liens or encumbrances upon said real estate, etc.

(10) Contracts of life insurance.

(11) Statement from employer showing wages, salary and commissions earned prior to the filing of your petition in bankruptcy but not yet received by you at such time.

(12) Certificates of stocks, bonds, and keys to any safety deposit boxes.

(13) Your last Federal and State income tax returns.

(14) The title papers to any motor vehicle, house trailer, or boats you own.

The Order further enjoined Petitioner from generally disposing of any and all property pending further order of the Court.

The basic facts herein are set forth in the opinion of the Referee's Finding of Fact and reference for complete detail is incorporated herein and may be summarized briefly:

The Bankrupt-Petitioner is an experienced business man. In 1948 he was employed as a collection man in the field for a small loan office, and in 1951, became manager thereof for four (4) years, he operated a small furniture business at Wurtland, Kentucky, for one and a half years. He has been in business for himself since 1960 (Transcript of hearing 10 December 1969, pages 45-46).

Bankrupt-Petitioner and one Challie Yates, Jr. became partners in a User Car lot under the name of Ashland Recovery Service. Each had been in business prior as partners, "Yates Auto Mart," Respondent-Objecting Creditor floor planned their automobiles and many of Petitioner's car sales to customers were financed by Respondent with full recourse (Tr. 17 February 1969, pages 40-41). During 1964 Yates and Petitioner sold 25-30 cars a week and sold some $600,000.00 worth of cars that year. However, sometime that year Yates informed Petitioner that they were "Out of Trust" and in trouble with Ashland Discount Company (Respondent herein) for $30,000.00 (Tr. 17 February 1969, pages 48-52).

At the end of 1964 Petitioner took over the business and the $30,000.00 "out of trust" liability was divided

equally between Petitioner and Yates, but Yates got in trouble and Petitioner took over *in toto* (Tr. 17 February 1969, pages 54-56).

Separate accounting was done by Respondent for Petitioner and Yates and each signed separate negotiable promissory notes for the individual assets to Petitioner and Respondent, to secure Respondent, furnished divers real estate mortgages, guarantors, etc. to Respondent on 23 December 1966.

On 25 June 1968 Petitioner's used car business was terminated and on 5 March 1968 Petitioner entered the "Model Raceway" business (Tr. 9 October 1969, pages 33-34; Exhibit O to Tr. 10 March 1969, of also Tr. 27 May 1969, pages 44-62).

Prior to 23 December 1966 Petitioner received divers rental income from the real estate mortgaged to Respondent (Tr. 10 December 1969, page 44).

Between June 1968 and 2 December 1968, the filing date of Petitioner's petition in Bankruptcy, the Petitioner engaged in the business of purchasing salvaged or damaged mobile homes (Tr. 9 October 1969, pages 25-32). He had the mobile homes assigned to "Ashland Recovery" real estate because he figured Morgan Driveways would give "us a better transport deal" (Tr. 10 December 1969, pages 44-45).

In October 1969 Petitioner submitted a bid of $1,251.00 to Foremost Insurance Company on a 1969 Holiday Traveler Travel Trailer which was sold for its salvage value by Foremost. Petitioner received a blank bill of sale therefor and notarized the seller's signature (Tr. 27 May 1969, pages 33-44; Tr. 10 March 1969,

page 76; *Id.*, page 35; *Id.*, page 36, Exhibit N to Tr. of May 27, 1969). Petitioner did not pay for the trailer at that time (Tr. 27 May 1969, pages 33-34).

Petitioner was unable to obtain the $1,251.00 to pay for this trailer. His brother agreed to borrow the money and cover the bid (Tr. 10 December 1969, pages 78-79). On or about 21 November, 1968, Petitioner typed the name of his brother, Clifford Enyart, in a blank bill of sale and gave it to him to take to the Clerk of the Greenup County Court to obtain a license for said trailer (Tr. 27 May 1969, pages 34-37, Exhibit N). On 21 November 1968, Petitioner notarized for his brother's affidavit supporting vehicle license application. This application stated that the vehicle described therein (space for description is blank) was brought into Kentucky on 21 November 1969 [sic]. Sometime after this date one Harold Borders picked up the trailer and brought it into Kentucky. It was parked at Petitioner's home when the Bankrupt-Petitioner filed his petition in bankruptcy (Tr. 27 May 1969, pages 30-34). The trailer was not listed as an asset in Bankrupt's petition. The transfer of title is not set out in the Statement of Affairs. All other trailer sales were equally omitted therefrom (Tr. 27 May 1969, pages 25-29).

On the date of bankruptcy, 2 December 1968, Petitioner maintained a checking account in the Second National Bank of Ashland, Ashland, Kentucky, in the name of Ashland Recovery. The balance there was .67 cents. On 6 December 1968, Petitionar wrote a check for $348.16 payable to Holiday Rambler (Ex-

hibit M to Tr. 10 March 1969). This check was for purchase of materials, outside metal, for repair of the 1969 Holiday Traveler Travel Trailer (Tr. 27 May 1969, page 34).

On 9 December 1968, Clifford Enyart borrowed $1,250.00 from another bank and gave said bank a Security Agreement on the trailer which was duly lodged for record (Exhibit N to Tr. 10 March 1969). Clifford Enyart gave the money to Petitioner on 9 or 10 December 1968 with an additional $275.00 for a total of $1,525.00, all of which petitioner deposited in the Second National Bank of Ashland. On 9 December 1968, Petitioner wrote Foremost Insurance Company a check for $1,171.00 in payment for the net balance on the trailer (Exhibit M to Tr. 10 March 1969; Tr. 10 March 1969, pages 60-61).

Bankrupt-Petitioner omitted one Thunderbird automobile, year 1955 (Tr. 27 March 1969, pages 62-64; Tr. 10 December 1969, pages 63-64) conveyed the title to one Meade from McNeal (Exhibit No. 5 to Tr. 10 December 1969; Tr. 10 December 1969, pages 69-74); Petitioner paid off the floor plan on the Thunderbird on 30 October 1968 (Tr. 27 May 1969, pages 70-71). Petitioner retained the proceeds of sale of the Thunderbird on 24 February 1969 and used it to pay off the floor plan of another car and to pay rent (Tr. 10 December 1969, page 75). He paid off the floor plan on the Thunderbird eight months later to Respondent with funds from other sources (Tr. 9 October 1969, page 43).

The Bankrupt-Petitioner admits he has not filed State and Federal income tax returns for the calendar

years 1965, 1966, 1967 and 1968 (Tr. 9 October 1969, pages 14, 22-23). Neither is it clear that he filed State and Federal withholding returns for those years (*Id.*, pages 5-6).

The Bankrupt-Petitioner maintained three bank accounts: One in the name of Ashland Recovery Auto Sales in the First National Bank of Ironton, Ohio; one in the name of Ashland Recovery in the Second National Bank of Ashland, Ashland, Kentucky, and a joint personal bank account with his wife in First and Peoples Bank of Russell, Kentucky.

He used all these accounts rather indiscriminately in the conduct of his business affairs (Tr. 9 October 1969, pages 14-15). He has not produced all the cancelled checks written on these accounts (Tr. 9 October 1969, page 77).

The Bankrupt-Petitioner maintained a ledger book of everything paid by check, by date, check number, payee and amount (Tr. 9 October 1969, page 15) but there are *no* entries in the ledger book for the eleven months of the year 1968 preceding bankruptcy (Tr. 9 October 1969, page 18).

Petitioner testified he had receipt book showing his income from rental property, but the receipts had not been entered in a ledger book, had not been turned over to the Trustee at the time of the initial hearing on the specifications of objections to discharge on 9 October 1969 (Tr. 9 October 1969, pages 77-79).

The Bankrupt-Petitioner did not have any composite record of income, expenses for taxes and upkeep,

depreciation or net profit from rental property (Tr. 9 October 1969, pages 20-21).

Bankrupt-Petitioner did not keep a copy of the Bill of Sale to each car he sold (Tr. 9 October 1969, page 21). He testified he had copies of the financing statements covering the cars he had sold during 1967 and 1968, but these had never been delivered to the Trustee, or to the Bankrupt's accountant (*Id.*, pages 21-22). There was no separate record of cash payments received by Petitioner as down payments on the purchase of cars, other than as noted on the purchase order covering the sale of cars (*Id.*, page 23). The Petitioner did not keep ledger cards covering the sale of cars for which he was to be paid in installments, but merely noted receipts on the sales slips (*Id.*, page 23). None of these records have been turned over to the Trustee (*Id.*, page 24). The Bankrupt-Petitioner had no record of the total amount of auto sales for the years 1966, 1967 and 1968 (*Id.*, page 25).

The Bankrupt had no record of his gross income from trailer sales during 1968. His testimony was that he would have to reconstruct this from cancelled checks and receipts on a month to month basis. He admitted that the income from trailer sales was used for living expenses and might not have gone into any checking account (*Id.*, pages 30-31; Tr. 10 December 1969, pages 16-17).

The Bankrupt-Petitioner kept no written inventory of the Model Raceway business (Tr. 10 December 1969, page 34). He produced no books or records relating to that business other than the agreement filed as Ex-

hibit O to the transcript of testimony of 10 March 1969 covering acquisition of the equipment for the business.

On one occasion the Petitioner collected $1,300.00 in full payment for the "Cline car." The purchase contract had been assigned to Respondent by Petitioner. Petitioner misappropriated this payment and paid it out in cash (Tr. 10 March 1969, pages 50-52).

The Bankrupt had no record of how many cars financed with Respondent with recourse had been repossessed and returned to his lot during the years 1966, 1967 and 1968 (*Id.*, pages 53-54).

Petitioner had no record of the amount of money he withdrew from his used car business for personal living expenses for 1966, 1967 and 1968, and admitted he submitted no lists of inventories of the car lot or other assets to the local taxing authorities for those years as required by local and state laws (*Id.*, pages 56-57).

Counsel for Petitioner conceded that information from the petitioner's records had not been collected and had been neglected for several years (Tr. 9 October 1969, page 76).

In 1965 Petitioner employed one C. J. Rice to do his tax work and to keep his books. For some reason, Petitioner did not discover until 1967 (two years or so later) that Rice was not doing this work (Tr. 9 October 1969, pages 68-70).

On or about the date of the filing of the Specifications and Objections to Discharge, 31 July 1969, Petitioner contacted one Ira Smith, a C.P.A., about putting the Petitioner's book and records in order (Tr. 10 De-

cember 1969, pages 14-15). The C.P.A. did not receive the records and actively begin work thereon until 60-70 days later, after the initial hearing on the Specifications of Objections to Discharge held 9 October 1969 (*Id.*, page 8). The C.P.A. was of the opinion that an interested creditor or Trustee could *not* have ascertained the financial condition of the Petitioner from the records in the condition of the Petitioner from the records in the conditions they were delivered to the C.P.A. (Tr. 10 December 1969, page 16). Also the record shows Petitioner made frequent withdrawals from the used car business in the form of cash and the record is not clear as to how these withdrawals were accounted for (*Id.*, pages 53, 59-61).

The Court is directed to the Transcript of Evidence, 9 October 1969 in its entirety. This entire transcript relates to questions of importance to any business man in relationship to the basic requirements of record keeping; i. e., gross sales, beginning inventory, cars purchased, ending inventory, cost of sales, gross profit, expenses such as rent, salaries and commissions, utilities, gasoline, parts, equipment and supplies, taxes paid, transfer and license expenses, depreciation, social security withheld and paid, miscellaneous and any and all other legal deductions such as cars paid off to Respondent on recourse. Petitioner had no records (Tr. 9 October 1969).

The Court will recall that Petitioner filed his petition in bankruptcy on 2 December 1968, that the initial hearing on the Specification to Discharge was held on 9 October 1969 and the next hearing thereon was held

10 December 1969 and no records had appeared in any form that would enable anyone to ascertain the financial position of Petitioner for any part of 1968 plus the preceding years. No tax returns for 1966, 1967, 1968, have yet been filed with the Trustee as of the date of this Brief.

VI. ARGUMENT

11 U.S.C. § 32(c) (Section 14 of the Bankruptcy Act) states:

> "The Court shall grant the discharge unless satisfied that the bankrupt has
>
> "(2) destroyed, mutilated, falsified, concealed or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the Court deems such acts or failure to have been justified unless all the circumstances of the case; or
>
> "(4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed any of his property, with intent to hinder, delay, or defraud his creditors, or
>
> "(6) in the course of a proceeding under this Act refusal to obey any lawful order of, or to answer any material question approved by the Court; or
> "(7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities; or

"Provided, that if, upon the hearing of an objection to discharge, the Objector shall show to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision C, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

The Respondent filed its specifications and objections to discharge against Petitioner and reluctantly, even though it places a burden upon this Court, respectfully request that the Court read the transcripts of the five hearings, 17 February 1969, 10 March 1969, 27 May 1969, 9 October 1969 and 10 December 1969 in order to fully understand the Petitioner's complete and flagrant disregard of the first lawful Order of the Referee specifically to the Petitioner, specifically ordering the Petitioner to bring to the first meeting of creditors:

(1) All books and records of account, bank books, bank statement (sic), check books and cancelled checks for the six months preceding bankruptcy.
(2) Contracts of life insurance.
(3) Statement from your employer, etc.
(4) Certificates of stock, etc.
(5) Your last Federal and State income tax returns.
(6) The title papers to any motor vehicles, house trailers or boats you own.

In response to this Order, Petitioner brought a small box of what purported to be records and one ledger showing some eight or nine months of 1966 (Tr. 17 February 1969, page 12; Question 31, Answer 31).

The Petitioner's lack of records, his failure to keep and preserve such records, and his patent, almost naive complete disregard for any type of orderly conduct of and maintaining even such simple records of a receipt book and a check reflect his attitude and is shown clearly through all five hearings. The Petitioner has, by his own testimony and actions, shown himself to be a "hippocket" business man.

Respondent submits Petitioner didn't change his overall lack of concern for records up to and after the filing of his petition in bankruptcy, and to the date of the writing of this Brief.

Petitioner submits no answer to what has been made apparent in this record showing the Petitioner's complete disregard for any lawful compliance to either the Internal Revenue Code or of this Act.

Petitioner and his attorney consistently attempted to show Petitioner was not a bookkeeper, that he knew little or nothing about it, etc. Yet Petitioner admitted he was the Manager of a small loan company and was not only charged with supervising this complicated accounting system but also had to check it personally. He also operated a furniture store for a year and a half.

On the hearing on 10 December 1966 transcript, pages 54 and 55, Counsel for the Trustee asked:

"Q. 33. Well, could you from the records that you had in your business in the Ashland Recovery,

were you able to look at the records you had at the end of the year and determine whether or not you had a profit or a loss?

A. 33. No, I never had it down in this type of form. It was not compiled at the end of the year. The end of the year was just like any other day."

Petitioner simply couldn't be bothered, payment of taxes apparently never entered his head.

The law, both statutory and case law, is well settled in the failure to keep records category of this problem:

"A bankrupt must either produce such records as are customarily kept by a person doing the same kind of business or he must justify to the Court his failure to produce them; after the Creditor has shown the absence of any adequate records, the burden falls upon the bankrupt of satisfying the Court that his failure to produce them was justified." *In Re Rose* (D.C. N.Y. 1943), CCH Dec. 54360.

"Where the evidence amply supported a referee's ruling that the bankrupt failed to keep or preserve books of financial transactions, the burden of proving that he had not committed any of such acts fell upon the bankrupt and his inability to meet this burden of proof resulted in the denial of a discharge." *Ginzburg* v. *Johansen* (CA-5, 1962), 300 Fed. 2d 40, CCH Dec. 60,341.

The Courts have gone further, consider, in the case:

"The Trustee in bankruptcy filed several specific objections which were eventually narrowed to failure to submit the proper books and records to

explain certain transactions which were improper on their face. The Referee found that the debtors had failed to keep the proper books and records, and debtors contended that the transactions would have been explained by records contained in a large carton of assorted miscellaneous records. The Court stated that the burden on the debtor to disapprove the specifications of the Trustee, and this burden was not met by reference to a mass of records, with the expectation that the Court or Trustee would search all of them, or examine each one." *In Re Berkowitz,* USDC Southern District of N. Y., No. 89745, 11 June 1965, CCH Dec. 61, 395.

"The law does not require records to be kept in any special manner, but they must be adequate and reasonable for the type of business carried on by the individual." *In Re Case* (D.C. N.Y. 1961), CCH Dec. 60, 218.

The Court in the case of *In Re Shapiro* (D.C. P.S. 1953), 110 Fed. Supp. 228, CCH Dec. 57, 787, holds:

"Evidence revealing that after filing a voluntary petition in bankruptcy the bankrupt withheld his books of account from the Trustee in bankruptcy sufficed to sustain the referee's refusal of a discharge."

Specifically the Courts have ruled on the specific item of lack of records or failure to keep adequate records as such lack of records apply to the keeping of inventory records by holding:

"Failure of the bankrupt to preserve records of physical inventory resulted in the denial of a dis-

charge. The bankrupt had taken physical inventory only at six month intervals in order to obtain financing. However, after each report to the credit agency, he destroyed the detailed records, and retained only the total asset figure. Such a practice violated the Bankruptcy Act books and records provisions." *In Re Kay* (D.C. N.Y.), CCH Dec. 60, 350.

By the same token Courts have carried the burden of keeping records to this extent:

"A Commissioner's findings that the bankrupt continued to conduct his business after a petition in bankruptcy was signed without keeping records of any kind was sufficient to sustain a denial of discharge." *In Re Duca* (D.C. N.Y. 1958), CCH Dec. 59, 252.

In this case, Petitioner has made repeated statements pertaining to his records that many of them were still at his home. They have not been delivered to the Trustee as of the time of this writing. Both the Act and Internal Revenue Code places the burden squarely and unequivocally on any person engaged in business or working for another as the records pertain to proof of financial condition. The District Court of the Eastern Division of Pennsylvania speaking through Circuit Judge Freedman said:

"A bankrupt was denied a discharge under Section 14C(2) of the Act because he failed to present books of account and financial records. The Trustee's examination of the bankrupt's records revealed that they were incomplete. The record dis-

closes that prior to bankruptcy the records had been stored in open cartons in the bankrupt's garage." *In Re Rubin* (D.C. Ed. Pa. No. 25974, September 24, 1964), CCH Dec. 61, 239.

In the same light this appropriate case which is on "all fours" with the case at bar:

"The failure of a bankrupt to keep books and records from which his financial condition and business transactions could be determined resulted in the denial of a discharge in bankruptcy. The bankrupt turned over old records to the Trustee, but nothing was given from which the Trustee could get an accurate look at the situation of the bankrupt for the period within one year of the filing of the petition." *In Re Kenny* (D.C. E.D. of Tenn. N.E. Div. No. 8842, 9 August 1968), CCH Dec. 63, 013.

The Court in the Ninth Circuit case cited below has stated the primary requirement for the objecting creditor to establish, and that is:

"We must keep in mind that the Appellant (Bankrupt) was before the Referee on at least four different occasions attempting to give an explanation of why he didn't keep better books or records and on the issue of what happened to the books and records which he had kept, some of which, evidently disappeared after the adjudication and between the hearing. We are not here discussed in *In Re Heathcock,* 165 Fed. Supp. 182 (M.D. N. C. 1958). Moreover, the concurrent findings of the Referee and the District Court are not to be set

aside except upon a clear demonstration of a mistake." *Hillard* v. *Hollens,* 290 Fed. 2d 263, 265 (6th Cir. 1961).

The Court goes on:

"The record clearly supports the Referee's findings and that of the District Judge that the Appellant (Bankrupt) failed to establish a justification for not keeping books of account or records from which his business transactions might be ascertained. *On this issue, the objecting creditor need merely show that there are reasonable grounds to believe that the Appellant committed the Act and the burden affirmatively disproving commission or of establishing justification then shifts to the Appellant.*" Collier on Bankruptcy, Volume 1, pages 1370-1371; *Nis* v. *Sternberg,* 338 Fed. 2d 611, 612 (8th Cir. 1930).

Respondent submits to the Court that it has met, joined, surmounted and overwhelmed its requirements on the question of "Records." Petitioner has offered no justifiable reason for his failure to keep and maintain adequate records for any period of time. Petitioner was and is a business man, "Hippocket operator" perhaps, but a business man who can read a balance sheet.

It is apparent from the cases cited herein that Respondent did not have the burden of demanding any records from Petitioner. The law confers the right upon Respondent for Petitioner to have adequate records so that his financial condition could be ascertained. No notice requirement is necessary. Respond-

ent learned at the first meeting of creditors that no tax returns had been filed for 1966, 1967 and 1968 from Petitioner's own admission. Petitioner had some two to two and one-half months' notice when the specifications and objections to discharge was filed. The pleadings set forth the grounds.

The Referee did not abuse his discretion in not granting Petitioner an additional forty-five (45) days. It would have taken ninety (90) days to separate and get his "papers" into a recognizable form to set up a set of books. Witness Smith, the C.P.A., stated no laymen could take these records as delivered to him and make anything out of them. The Referee was the very epitome of judicial fairness to Petitioner and his Counsel all through all five hearings plus the first meeting of creditors. Respondent submits to the Court that the Referee "leaned over backwards" to be lenient with Petitioner and his Counsel. The additional time requested by Petitioner (45 days) was an encroachment upon the time of the Referee, the Trustee, his Counsel, Respondent's people and Respondent's Counsel. The petition was filed 2 December 1968. The last hearing was in December 1969. It is submitted Petitioner had all the time in the world to have had his records adequate.

VII. CONCLUSION

In conclusion it is respectively submitted that the bankrupt was afforded ample opportunity to be fully heard on the issue relating to the adequacy of his records and there is no inconsistency in the finding and interpretation of the District Court and the District Court of Appeals in its interpretation of 11 USC 32(C). If there was any inconsistency existing only in the minds of Counsel for the Petitioner and surely not in the minds of the Court. There is no Federal question involved, no inconsistency in the ruling of any Circuit Court of Appeals pointed out by the Petitioner and the petition for certiorari should be denied.

JOHN MARION WILLIAMS
Second National Bank Building
Ashland, Kentucky 41101

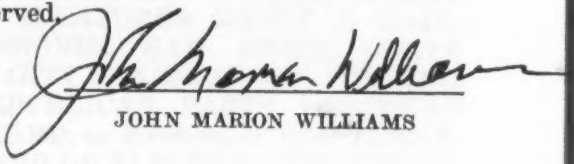
JAMES E. ADKINS
ADKINS AND ADKINS
2813 Louisa Street
Catlettsburg, Kentucky 41129

JOE R. MASSEY, JR.
203 Kitchen Building
Ashland, Kentucky 41101

Counsel for Respondents

PROOF OF SERVICE

I, John Marion Williams, Attorney for Respondent herein, hereby certify that on this 26 August 1972, three copies of the Joint Brief In Opposition were mailed first class, postage prepaid, to John T. Diederich and Michael R. Dowling, 500 Price Building, Ashland, Kentucky 41101. I further certify that all parties required to be served have been served.



JOHN MARION WILLIAMS